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Supreme Court, U.S.
FILED
OCT - 7 1994
OFFICE OF THE CLERK

No. 94-42

In the Supreme Court of the United States

OCTOBER TERM, 1994

ROSS MIDDLEMIST, ET AL., PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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10 pp

QUESTION PRESENTED

Whether, in the absence of ongoing tribal proceedings, an action challenging the Confederated Salish and Kootenai Tribes' authority to regulate nonmembers' activities that affect aquatic lands on the Flathead Indian Reservation was properly dismissed pending exhaustion of tribal remedies.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A17) is reported at 19 F.3d 1318. The opinion of the district court (Pet. App. A1-A15) is reported at 824 F. Supp. 940.

JURISDICTION

The judgment of the court of appeals was entered on April 6, 1994. The petition for a writ of certiorari was filed on July 5, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Confederated Salish and Kootenai Tribes are federally recognized Indian Tribes. They occupy the Flathead Reservation, which was established by the 1855 Treaty of Hell Gate, 12 Stat. 975, in what is now the State of Montana. The Reservation includes part of Flathead Lake, a navigable body of water roughly 26 miles long and up to 5 miles wide.

On December 13, 1985, the Tribal Council for the Confederated Tribes approved Tribal Ordinance 87A, also known as the Aquatic Lands Conservation Ordinance (ALCO) (*reproduced at* C.A. E.R 64-74). Pet. App. A2, A40-A42. ALCO is a civil regulatory ordinance designed to implement the tribal and federal goals of protecting the Reservation's aquatic habitat, upon which depend the fish and wildlife resources reserved to the Confederated Tribes by treaty. See *Confederated Salish & Kootenai Tribes of Flathead Reservation* v. *Namen*, 665 F.2d 951, 964-965 (9th Cir.), cert. denied, 459 U.S. 977 (1982); *Joint Board of Control of Flathead* v. *United States*, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988).

The Secretary of the Interior approved ALCO on December 20, 1985. Pet. App. A2. Shortly thereafter the Confederated Tribes issued proposed implementing regulations for public review and comment. *Ibid.* The final regulations were promulgated in accordance with the Tribal Administrative Procedures Ordinance, a tribal law approved by the Secretary that closely parallels the Administrative Procedure Act, 5 U.S.C. 551 *et seq.* See Pet. App. A2. None of the petitioners in this case sought to challenge the regulations during this notice and comment period. *Id.* at A2-A3.

ALCO is administered by the Shoreline Protection Board (Board), a tribal board that includes both Indians

and non-Indians who reside on the Flathead Reservation. ALCO and its implementing regulations establish a tribal administrative review and permitting process applicable to all persons—tribal members and nonmembers—who wish to engage in projects that have the potential to cause a material change in the condition of Reservation waters, wetlands, or aquatic lands, as those terms are defined in ALCO. See ALCO Pt. III, § 1(c), (m) and (p) (see C.A. E.R. 66, 68). The activities covered by ALCO include (but are not limited to) dredging, filling, unregulated access detrimental to aquatic lands, irrigation diversions and returns, drainage ditches, and construction on aquatic lands. ALCO contains specific exceptions to the general applicability of ALCO. See ALCO Pt. IV, § 5 (see C.A. E.R. 71); Final Regulations for ALCO Pt. III, § 3.3 (see C.A. E.R. 84).

Proposed undertakings are reviewed by an interdisciplinary team of professionals, and a determination is made as to the applicability of ALCO and the propriety of a permit. Between 1987 and 1991, 315 ALCO permit applications were processed by the Board and 297 permits were issued. C.A. E.R. 61. Any person aggrieved by a final action of the tribal government is entitled to seek administrative review pursuant to procedures contained in the Tribal Administrative Procedures Ordinance. That process involves review by the Board, whose decision is appealable to an administrative law judge. Upon exhaustion of administrative remedies, judicial review is available in the Tribal Court of the Confederated Salish and Kootenai Tribes. See ALCO Pt. VI (see C.A. E.R. 73-74).

2. Petitioners Ross Middlemist and Wayne W. Maughan are non-Indians who own ranch or farm land on the Reservation and who wish to engage in activities that may physically alter aquatic lands, wetlands, or

Reservation waters. Pet. App. A22-A28. Petitioner Flathead Joint Board of Control is comprised of elected representatives of three Irrigation Districts—the Flathead, Mission, and Jocko Valley Districts—served by the Flathead Irrigation and Power Project. *Id.* at A22. On November 6, 1991, petitioners brought this action in federal district court. *Id.* at A19-A39 (Complaint). The Complaint alleged that Middlemist and Maughan have begun the process of applying for, or intend to apply for, requisite permits from federal, state, and local agencies. See *id.* at A24-A28. The Complaint further alleged that Middlemist and Maughan were informed by those agencies that an ALCO permit would also be required. *Id.* at A24-A25, A28. Petitioners sought declaratory and injunctive relief barring the tribal government from applying ALCO to any activities carried on by non-tribal entities on fee lands. *Id.* at A38. Petitioners also named as defendants officials in the Department of the Interior, alleging that the Department had acted unlawfully in approving ALCO and in providing funding to develop, implement, and enforce the Ordinance. *Id.* at A37-A38, A39. Neither Middlemist nor Maughan applied for a tribal permit or initiated an administrative or judicial challenge in tribal forums. *Id.* at A25, A28.

3. Respondents moved to dismiss the suit, arguing, *inter alia*, that petitioners had failed to exhaust tribal administrative and judicial procedures available to challenge the Confederated Tribes' authority over the activities in question. Relying on *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987), and on Ninth Circuit decisions construing those precedents, the district court dismissed petitioners' action without prejudice pending exhaustion of available

tribal remedies. The court explained that because the case arose on the Reservation, directly implicated tribal government interests, and named tribal officials as defendants, the dispute was "[u]nquestionably" a "reservation affair" subject to the requirement that petitioners exhaust available tribal remedies. Pet. App. A8. Relying on *Crawford* v. *Genuine Parts Co.*, 947 F.2d 1405 (9th Cir. 1991), cert. denied, 112 S. Ct. 1174 (1992), the court rejected petitioners' contention that the absence of an ongoing tribal proceeding rendered exhaustion principles inapplicable. Pet. App. A6-A7. The court also found that none of the exceptions to the exhaustion doctrine set forth in *National Farmers Union*, 471 U.S. at 856 n.21, were applicable in this case. Pet. App. A12-A13.[1]

4. Petitioners filed a petition for a writ of certiorari before judgment, which was denied by this Court. 113 S. Ct. 2950 (1993). The court of appeals subsequently affirmed the judgment of the district court "on the basis of its well-reasoned published opinion." Pet. App. A17.

ARGUMENT

The court of appeals' holding that exhaustion of tribal remedies is required in the circumstances of this case is

[1] The district court also rejected petitioners' argument that exhaustion was impossible because the tribal court would lack jurisdiction over the federal defendants. Pet. App. A13. The exhaustion requirement would be satisfied, the court held, if petitioners pursued their tribal remedies against the tribal defendants. *Id.* at A14. The court noted that "[t]he issues concerning the Federal Defendants in this case are the same basic issues underlying the rest of the action," and that the record developed in tribal proceedings would be directly relevant to the district court's ultimate resolution of the claims against the federal defendants. *Ibid.*

correct and does not conflict with any decision of this Court or any other court of appeals. Accordingly, further review is not warranted.

1. Petitioners contend (Pet. 14) that this Court's decisions in *National Farmers Union Ins. Cos.* v. *Crow Tribe of Indians*, 471 U.S. 845 (1985), and *Iowa Mutual Ins. Co.* v. *LaPlante*, 480 U.S. 9 (1987), were "clearly premised upon the abstention doctrine enunciated in *Younger v. Harris*, 401 U.S. 37 (1971)." Noting that "[t]he central and continuing requirement for abstention in the *Younger* context is that there is an ongoing state proceeding," petitioners argue (Pet. 15) that the principles articulated in *National Farmers Union* and *Iowa Mutual* are inapplicable in the absence of an ongoing tribal proceeding. That argument is unpersuasive and does not warrant review.

a. There is no conflict among the circuits on this issue. In a case challenging tribal authority over nonmembers, the Eighth Circuit recently held that tribal remedies must be exhausted notwithstanding the absence of ongoing tribal court proceedings. *Duncan Energy Co.* v. *Three Affiliated Tribes of Fort Berthold Reservation*, 27 F.3d 1294, 1299-1301 (1994). The Tenth Circuit has likewise held that the tribal exhaustion requirement applies in the absence of an ongoing proceeding, see *Smith* v. *Moffett*, 947 F.2d 442, 444 (1991), as has the Ninth Circuit in other cases. See *Crawford* v. *Genuine Parts Co.*, 947 F.2d 1405, 1407 (1991), cert. denied, 112 S. Ct. 1174 (1992); *Burlington Northern R.R.* v. *Crow Tribal Council*, 940 F.2d 1239, 1244-1247 (1991). There is consequently no need for intervention by this Court to resolve any disagreement among the courts of appeals.

b. The decision of the court of appeals is fully consistent with this Court's precedents. Although both

National Farmers Union and *Iowa Mutual* involved ongoing proceedings in tribal court, this Court did not suggest that the pendency of such proceedings was a necessary prerequisite to the application of exhaustion principles. Nor is there any basis for petitioners' assertion that *Younger* abstention furnished the model upon which this Court's tribal exhaustion decisions were based. *Younger* itself was not cited in either *National Farmers Union* or *Iowa Mutual*. Only one *Younger* abstention case was cited in either of those decisions, see *National Farmers Union*, 471 U.S. at 856 n.21 (citing *Juidice* v. *Vail*, 430 U.S. 327, 338 (1977)); and *Juidice* was cited only as support for an exception to the tribal exhaustion rule where an assertion of tribal jurisdiction is motivated by a desire to harass or is conducted in bad faith. *National Farmers Union*, 471 U.S. at 856 n.21.

Indeed, the doctrine articulated in *National Farmers Union* and *Iowa Mutual* is not one of "abstention" at all; it is one of "exhaustion" of tribal remedies. See *National Farmers Union*, 471 U.S. at 857; *Iowa Mutual*, 480 U.S. at 19. That difference is more than semantic. This Court's tribal exhaustion cases expressly contemplate the prospect of subsequent proceedings in federal district court. See *National Farmers Union*, 471 U.S. at 857 ("exhaustion is required before * * * a claim may be entertained by a federal court"); *Iowa Mutual*, 480 U.S. at 19 ("If the Tribal Appeals Court upholds the lower court's determination that the tribal courts have jurisdiction, petitioner may challenge that ruling in the District Court."). Where *Younger* abstention principles apply, by contrast, disputed questions of federal law must be submitted to the state courts *rather than* to the federal district courts, with federal court review available, if at all, only in this Court. See *Pennzoil Co.* v. *Texaco Inc.*, 481 U.S. 1, 18

(1987) ("If, and when, the Texas courts render a final decision on any federal issue presented by this litigation, review may be sought in this Court in the customary manner.").

c. This Court's tribal exhaustion cases do not directly address the question whether exhaustion is required in the absence of pending tribal proceedings. The principles underlying those decisions have considerable force, however, even where no formal proceeding is ongoing in a tribal forum. This Court in *National Farmers Union* emphasized that (1) Congress is committed to a policy of supporting tribal self-government and self-determination, which favors allowing a tribal forum the first opportunity to evaluate the factual and legal bases for the challenge to its jurisdiction; (2) the orderly administration of justice in the federal court will be served by allowing a full record to be developed in tribal court; and (3) the exhaustion requirement will encourage tribal courts to explain to parties the precise basis for accepting jurisdiction and will provide other courts with the benefit of their expertise in such matters. 471 U.S. at 856-857. The *Iowa Mutual* Court also cited the federal policy of encouraging the development of tribal self-government and noted the "vital role" of the tribal courts. 480 U.S. at 14. The Court warned that "unconditional access to the federal forum would place it in direct competition with the tribal courts, thereby impairing the latter's authority over reservation affairs." *Id.* at 16.

Even in the absence of a pending tribal proceeding, application of an exhaustion requirement significantly furthers the ends identified in this Court's prior decisions. The exhaustion rule assists in the development of tribal self-government by ensuring that questions of tribal law, and of the limits imposed by

federal law on tribal authority,[2] are addressed in the first instance by the tribe itself. The rule also ensures that any subsequent examination by a federal court of the plaintiff's federal-law challenge to the exercise of jurisdiction by the tribe will be conducted with the benefit of the expertise of the tribal court—and, in the present context, the tribal administrative agency whose potential exercise of authority is being challenged.[3]

d. Petitioners also assert (Pet. 16-17) that the court of appeals' decision is wrong because it accords greater deference to tribal courts than to state courts. In fact, no anomaly exists. In limiting *Younger* abstention to cases involving pending state proceedings, this Court has acted in light of Congress's provision of an express federal cause of action available in federal court to redress state officials' deprivation of federal rights. See *Steffel* v. *Thompson*, 415 U.S. 452, 472-473 (1974) ("When federal claims are premised on 42 U.S.C. § 1983 and 28 U.S.C. § 1343(3)—as they are here—we have not required exhaustion of state judicial or administrative remedies, recognizing the paramount role Congress has

[2] In the context of judicial challenges to federal agency action, the rule that a plaintiff may not seek judicial relief until he has exhausted his administrative remedies "has been repeatedly acted on in cases where * * * the contention is made that the administrative body lacked power over the subject matter." *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50-51 (1938); see also *Ticor Title Insurance Co.* v. *FTC*, 814 F.2d 731, 739 (D.C. Cir. 1987) (general rule of exhaustion "has frequently been applied even where the plaintiffs have challenged the very authority of the agency to conduct proceedings").

[3] As noted above, this Court's decisions in *National Farmers Union* and *Iowa Mutual* contemplate the opportunity to challenge a tribal court's jurisdiction in federal court after tribal remedies have been exhausted.

assigned to the federal courts to protect constitutional rights."). Congress has not similarly given parties claiming that tribal authorities have exceeded their jurisdiction a right to choose to initiate litigation to decide that question in federal court. In the absence of a federal statute manifesting congressional intent that initial access to federal court be available for a particular party or class of cases,[4] the courts have greater latitude to impose an exhaustion requirement as a matter of sound judicial administration in support of Congress's strong policy of supporting tribal sovereignty and self-determination. Cf. *Darby* v. *Cisneros*, 113 S. Ct. 2539, 2543-2544 (1993).

2. Petitioners also assert (Pet. 18-23) that where neither a treaty nor a federal statute provides a textual source for a tribe's assertion of regulatory jurisdiction over nonmembers, the federal courts may not require nonmembers to exhaust tribal remedies before gaining access to the federal forum. Petitioners contend (Pet. 21) that a trilogy of this Court's decisions has established the rule that "when Congress has by statute opened reservation land to nonmember entry and acquisition, there is no basis, either in a treaty or in a tribe's inherent sovereignty, for the lawful exercise of jurisdiction over nonmember land use." The three cases on which petitioners rely are *Montana* v. *United States*, 450 U.S. 544 (1981); *Brendale* v. *Confederated Tribes &*

[4] See, *e.g.*, 28 U.S.C. 1345 ("the district courts shall have original jurisdiction of all civil actions, suits or proceedings commenced by the United States"); 42 U.S.C. 2000e-5(f) (person aggrieved by prohibited discrimination may file suit in federal district court after filing charge with Equal Employment Opportunity Commission).

Bands of Yakima Indian Nation, 492 U.S. 408 (1989); and *South Dakota* v. *Bourland*, 113 S. Ct. 2309 (1993).

Contrary to petitioners' assertion, this Court's decisions do not establish that Congress, in opening the Flathead Reservation to nonmembers, abrogated all sovereignty of the Confederated Tribes over nonmembers. In *Montana* v. *United States*, 450 U.S. at 566, the Court recognized that

> [a] tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.

This inherent power includes the right to exercise civil authority over conduct that involves the Confederated Tribes' water rights. *Colville Confederated Tribes* v. *Walton*, 647 F.2d 42, 52 (9th Cir.) (citing *Montana* v. *United States*, 450 U.S. at 566 n.15 ("Indian tribes retain rights to river waters necessary to make their reservations livable")), cert. denied, 454 U.S. 1092 (1981); see also *Felix S. Cohen's Handbook of Federal Indian Law* 587 (1982 ed.) ("Indian reserved water rights probably are protected against impairment of water quality as well as diminutions in quantity"). ALCO protects the Confederated Tribes' aquatic resources; it is not a land use statute. The activities of the individual petitioners are potentially subject to ALCO because they involve discharges into aquatic resources.[5] Thus, the Confederated Tribes' assertion of

[5] Wetlands are part of the navigable waters federally regulated under the Clean Water Act because disturbance of wetlands may have a profound influence on water quality. See *United States* v.

jurisdiction is not, as petitioners contend, without any facial validity. Petitioners concede (Pet. 22) that the *Montana* exceptions may permit the application of ALCO to nonmembers even if federal homestead mineral and townsite laws abrogated the Confederated Tribes' general authority to regulate nonmember land use on the Flathead Reservation. Petitioners provide no support, however, for their assertion (Pet. 22) that exhaustion of tribal remedies cannot be required in cases in which the issue is the application of the *Montana* exceptions. See *Duncan Energy*, 27 F.3d at 1301 & n.6 (exhaustion of tribal remedies is required so that the applicability of the *Montana* exceptions may be addressed, in the first instance, by tribal authorities).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1994

Riverside Bayview Homes, Inc., 474 U.S. 121, 134 (1985). The Confederated Tribes' regulation of activities under ALCO shares this direct connection to the Tribes' water resources.